

12th January, 1762.

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Unto the Right Honourable the Lords of Council and Session.

THE

PETITION

OF

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*James Smith junior, late Merchant in
Montrose,*

Humbly sheweth,

THAT the Petitioner was engaged in a Co-partnery with *Thomas Douglas, Robert Dunbar, and John Addison*, all Merchants in *Montrose*, in a Trade which they carried on to *England* and foreign Parts, with tolerable Success for some Years preceeding the Year 1753.

That the Practice of the Partners was, that when any of them wanted Money to lay out upon the Company-affairs, they applied to the Partner who had Cash at the Time, and got what they wanted, upon a Note or Bill payable on Demand; and upon satisfying the Partner from whom the Sum was received, that it had been duly applied towards the Purchase of Goods, or other Uses of the Company, the Notes or Bills were regularly given up and retired.

That

9th Aug. 1753. 15th That the Petitioner having Occasion for some Money for the Company's Use in *August* 1753, applied, as usual, to the said *Thomas Douglas*, who had the Company's Cash at the Time, and got from him 29 *l.* 3 *s.* 4 *d.* upon the 9th of *August*, and thereafter 34 *l.* 19 *s.* upon the 15th, for both which he gave Mr. *Douglas* his Bills, payable on Demand, at the respective Times when he received the Money.

The Petitioner furthwith applied the Money towards the Purposes intended, and thereupon retired his Bills from Mr. *Douglas*, and put them into his Desk, which, with the other Partners Desks, stood in a Room that was kept in Mr. *Douglas*'s House, for the Use of the Co-partnery.

That in *October* 1753, the Company's Affairs fell into Disorder, and when it was just upon the Point of breaking out, Mr. *Douglas* caused secrete away the Desks belonging to the several Partners, which stood in a Room in his House, and, in the Night-time, caused two Carters carry them privately down through his Garden, when they were put upon a Cart, and carried off to *Aberdeen*, and delivered to his Correspondent Mr. *Elphinston*, who kept them till *Douglas* came there, and had an Opportunity of searching all the Papers, and taking out such as he thought proper; and, among the rest, the above two Bills accepted by the Petitioner, which he had thereafter retired, and left in his own Desk as aforesaid.

After those, and many other Things done by the said *Thomas Douglas*, which he was not able to account for, the only Course he could take, was, to fly the Country, which accordingly he did by the first Opportunity of a Ship going from *Aberdeen* to *Virginia*, and made his Escape before the Warrants, that were issued out to apprehend him, could be put in Execution.

From the 1753, down to Summer 1758, the Petitioner heard nothing of these Bills, and had no Apprehension that any Claim was to be reared upon them; but in 1758, the Bills



Bills having come into the Possession of *Elizabeth Stephen*, the said *Thomas Douglas's* Wife, who, it seems, did not incline to pursue on them in her own Name, she applied to her Brother *Robert Stephen*, Merchant in *Montrose*, and desired him to fill up Indorsations in his Name above her Husband's Subscriptions, which were upon the Back of the Bills; but Mr. *Stephen* declined this, after conversing with the Petitioner; and being satisfied of the Truth of the Facts above set forth, and though Mrs. *Douglas* offered to allow him to retain, out of what he should recover, the Sum of 180 *l. Scots*, which her Husband owed him, yet this was no sufficient Temptation to prevail with him to concur in attempting to force the Petitioner to pay a Sum, which he was satisfied was not justly due.

Upon Mr. *Stephen's* declining to accept of the Indorsation, the Bills were indorsed to *Elizabeth Douglas*, Sister to the said *Thomas Douglas*, and Relict of *Robert Moodie*, Shipmaster in *Montrose*, who called the Petitioner before the Bailies of that Burgh, and he pled his Defence upon the Facts above stated; but though his Defences were given in, in *August 1758*, yet Mrs. *Moodie* did not think fit to make any Answer to it, till Aug. 10th
1758. *February 1759*, when the Petitioner was at *London*; and as the Case was not then much attended to on his Part, the Bailies gave Decreet against the Petitioner in *March 1759*.

The Petitioner having applied to this Court for Suspension of the Decreet on juratory Caution, the same was passed by your Lordships on Report; and having come in Course before the Lord *Prestongrange* Ordinary, the Petitioner being informed, that Mr. *Douglas* had sent the Bills over in a Letter to his Wife, with Orders to deliver them up to him, craved a Diligence for recovering of the Letter; upon which Mrs. *Douglas* was examined, and she deposed *negative*; and several other Interrogatories which had been given in by the Petitioner, for bringing the Matter to Light having, by Mistake, been
forgot.

forgot to be insert in the Commission, the Lord Ordinary was pleased to grant a new Commission for examining her thereon; but before it could be executed, Mrs. *Douglas* went off to *Virginia* to her Husband.

The Petitioner, being deprived of this Opportunity of bringing the Fact to Light, was resolved to shorten the Process, by referring to Mr. *Douglas's* Oath the Fact above stated, of his retiring the Bill, upon which the Petitioner's Defence was founded; and the Lord Ordinary having appointed Memorials to be given in, was pleased, upon the 9th *July* last, to pronounce the following Interlocutor: "Having considered this
" Memorial, with the Memorial for the Suspender, finds the
" Letters orderly proceeded, and decerns; finds Expences
" due, and allows the Charger's Procurator to give in an Account thereof." And upon advising a Representation and Answers, his Lordship has, upon the 17th of *December* last, "Refused the Desire of the Representation, and adhered to his former Interlocutor."

The Petitioner must humbly apply to your Lordships for a Review of this Interlocutor, and shall, in the first Place, shortly state the Defences he pleads against Payment of these Bills, which would be undoubtedly relevant against *Thomas Douglas*, to whom they were granted, were he the Pursuer.

1^{mo}, That the Bills were satisfied and retired by the Petitioner, and left in his Desk in the Compting-room kept by the Company in Mr. *Douglas's* House, and afterwards taken out by *Douglas*, when he broke open these Desks in the Town of *Aberdeen*, to which he had caused carry them off, upon the breaking out of his Bankruptcy. The Fact, as to the secreting away the Partners Desks in the Night-time, is notorious in the Town of *Montrose*, and could be proved, if necessary, by *John Cbrystie* and *William Oldman*, the two Carters who carried them off, and by those to whom they delivered them at *Aberdeen*; but, to avoid all further Trouble in this Matter,

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the Petitioner was willing to refer the whole Fact to Mr. *Douglas's* Oath.

2do, If the Bills had not been so retired, they would have been compensated by much greater Sums due to the Petitioner by *Thomas Douglas*. It appears by the Company-books, which are lying in the Custom-house of *Montrose*, that *Douglas* is Debitor to the Company in the Sum of 491 l. 13 s. 4 d. *Sterling*; of which, the Share due to the Petitioner does far exceed the Sum in the Bills. This appears by a Certificate of *John Ritchie* Merchant, and *William Baillie* Writer in *Montrose*, who carefully examined the Books, in the Presence of Mr. *Scott of Logie*, one of his Majesty's Justices of the Peace in the said County; a Copy of it is hereto subjoined.

3tio, This is not the only Ground of Debt competent to the Petitioner against Mr. *Douglas*. He was unluckily bound with him in joint Bonds, for Duties to the Crown, to the Amount of 3089 l. 16 s. 2 d. *Sterling*, of which the Petitioner is intitled to Relief of one Half, and is well founded to plead Retention of any Debt that might be due by him to *Douglas*, until he obtain that Relief.

These Grounds of Payment, Compensation, and Retention, the Charger did not object to be relevant against Mr. *Douglas*; but she insisted, " That they could have no Effect
 " against her, to whom the Bills are indorsed for Value received : That the Presumption is, that Value was accordingly paid: That though the Act of Parliament 1621 annuls all Deeds done by Bankrupts to conjunct or confident Persons, in Defraud of their Creditors; and by the Construction of that Act, the Narrative of such Deeds is not held sufficient to prove the Onerosity without an Astruction; yet this takes Place only where a Challenge is brought by an anterior Creditor: In that Case the conjunct Person must show some Evidence of the Onerosity: But this Privilege, introduced in Favour of Creditors, ought not to
 B " be

“ be perverted to their Prejudice, by diminishing the Bank-
 “ rupt’s Funds, and affording a Pretence to his Debtors to
 “ cover themselves from Payment of their Debts : That even
 “ a Creditor of *Douglas’s* could not quarrel the Indorsation,
 “ otherways than by bringing a Reduction of it upon the Act
 “ 1621 ; but as no such Reduction has been brought, the
 “ Suspendor appears to be struggling to avoid Payment of a
 “ just Debt.”

But the Petitioner believes your Lordships will lay no great Stress upon the Presumption arising from the Recital in these Indorsations filled up *ex post facto*, above the Subscriptions of *Thomas Douglas*. Your Lordships have heard, that while the Subscription was blank, Application was made to Mr. *Robert Steven* in *Montrose*, to accept of Indorsation to the Bills, which he declined. The Charger, Mrs. *Moodie*, having afterwards been pitched on to be the Pursuer, an Indorsation was filled up in her Name as follows, *Pay the Balance to Elizabeth Douglas, Relict of Robert Moodie Shipmaster in Montrose, or Order, Value received of her by.* This Indorsation, having been filled up at *Montrose*, when *Thomas Douglas*, to whose Subscription it is super-induced, was at some Thousand Miles distant from that Place, it cannot be considered even as an Acknowledgment on the Part of *Douglas*, that any Value had been actually paid to him by his Sister. Nor indeed has it been alledged, that any Value was given by her to him, or to any other, for his Behoof at that Time; and if it is supposed to refer to an antecedent Value, or Debts, which he formerly owed her, these ought to be instructed by prior Documents, which it is incumbent on her to produce.

And therefore, from all the Circumstances of the Case, there is no Ground to presume or imagine, that any Value was paid for these Indorsations; but in the *next Place*, even abstracting from these Circumstances, the Presumption of Law lyes against the Charger. Nothing is better established, than that the
 Narrative

Narrative of a Deed granted by a *Bankrupt* to a *conjunct Person*, proves nothing against a *Creditor*, unless it is astringed by other Evidence; and it does not occur to the Petitioner, upon what Ground the Charger disputes, that he was a prior Creditor to Mr. *Douglas*. It appears from the Company Books, that the Petitioner's Share of the Balance due by the Company to *Douglas*, far exceeds the Sums in the Bills in Question; and it will appear from the joint Bonds granted to the Crown, in the Hands of the Solicitor for the Customs, that the Petitioner was engaged with *Douglas* in Sums above 3000*l.* of which he was entitled to Relief for one Half from *Douglas*; and upon both these Grounds he is intitled to insist, that no Credit is to be given to the Allegation set forth in this *post facto* Indorsation as if Value had been sent by the Charger to her Brother in *America* in 1758, when her Name was filled up to his blank Subscription, which is a Thing that no Mortal will believe to have been truly the Case.

And besides these Grounds, it is submitted to your Lordships, if it would not be sufficient to entitle him to insist in this legal Presumption, that he is ready to prove, that in Fact these Bills were retired and given up to him by *Douglas* before his Bankruptcy, upon his being satisfied, that the Money was applied to the Purpose for which it was given. After such Discharge, or retiring of the Bills, *Douglas* was bound to warrant the Petitioner against any Hazard, from a future Conveyance of this extinguished Debt to a third Party; and if he conveyed them to a *conjunct Person*, as in this Case, the Narrative will not prove that Value was given, to the Prejudice of the Petitioner, who would be so essentially hurt by this double Deed.

But, in the *next Place*, if it were supposed that Value is to be presumed to have been given by the Charger to her Brother in *America*, after he had made his Escape from the Diligence of his Creditors; yet, after a Delay of four or five Years, the Charger's Indorsation, suppose it had been onerous, can have

no further Effect than a common Assignment. The extraordinary Privileges competent to *Bills of Exchange*, and the *Transmission* of them, as they have been introduced by Law, allenarly for the *Benefit of Commerce*, so they subsist no longer than the Reason that introduced them requires. And accordingly, after the Elapse of three Years, your Lordships have always found, that these Privileges are at an End: That after that Period, Indorsees of Bills are always found liable to the Exception of *Compensation* upon the Indorser's Debt, of *Arrestments* laid on for the same, or *Payments* made to the Indorser by *separate Receipts*; and indeed to every other Exception that is competent against an ordinary Assignee. This is established by an uniform Tract of Decisions, some of which are to be seen in the *Dictionary*, Title *Bills*, Folio 98. nor does the

Dictionary, Vol. I.
Fol. 98.

Petitioner know that there are any to the contrary. It has indeed been sometimes thought, that they should be limited to a shorter Space, *viz.* to the same Period with *summar Diligence*, but the Petitioner believes it was never pretended, that such Privilege was to subsist during the long Prescription, or for any longer Space than *three Years*.

And, if in any Case, this Limitation ought to be observed in the present, where the whole of the Claim lyes under great Suspicion. Bills payable *on Demand*, upon which no *Interest* could run till a Demand is made, yet never heard of for near five Years, and then appearing in the Person of the Bankrupt's Sister, upon an Indorsation filled up *ex post facto*, and evidently affected, as no Value can be supposed to have been paid by her to her Brother at the Time; and if the Indorsations were supposed to be granted either in Security, or in Satisfaction of prior Debts, then they could never be entitled to the Privilege of Indorsations of *Bills of Exchange*; but, on the contrary, are liable to Reduction upon the Act 1696, at the Instance of every prior Creditor, as was found 2d February 1700, *Durward contra Wilson*, observed by Lord Fountainhall;

Feb. 2.
1700,
Durward.

hall; and 16th January 1713, *Campbell contra Grahame*, observed by President *Dalrymple* and Mr. *Forbes*.

Jan. 16. 171
Campbell.

In this View of the Case, if the Charger's Title were to be considered as onerous, but at the same time no better than a common Assignment, tho' she would not be bound to allow Facts to be proven by her Cedent's Oath, yet there is no doubt she must be liable to Compensation upon the Petitioner's Share of the Sum of 491 l. due by *Douglas* to the Company, and also in the Exception of Retention competent to the Petitioner, until he is relieved of *Douglas's* Share of the Debt he stands engaged in with him to the Crown. That an onerous Assignee is liable to Compensation upon the Cedent's Debt has never been doubted. And tho' an illiquid Ground of Retention might be objected to, yet where the Debtor is engaged as *Cautioner* for the Cedent in a plain liquid Bond, his Claim of Relief has always been found a good Ground of Retention even against an onerous Assignee. So it was decided in January 1683, *Sibbald contra Turnbull*, observed by Lord *Harcarse*; and February 14th 1708, Mr. *Patrick Strachan* against the Magistrates of *Aberdeen*, observed by Mr. *Forbes*; and other Cases unnecessary to be recited.

Harcarse (Com
pensation) P.
61. Jan. 1683.

Feb. 14. 1708.
Strachan con-
tra town of A-
berdeen.

With Respect to the Fact, the Petitioner has already mentioned the Evidence, viz. Mr. *Douglas's* Books, for the Balance due by him to the Company, and the Bonds granted to the Crown, for which he is entitled to Relief, as to one Half of his joint Engagements. He craved a Diligence from the Lord Ordinary, to recover these Documents; and must humbly pray the same from your Lordships, if they should be contested by the Charger, as it is possible they will not, being both very notorious.

And lastly, that the Petitioner's whole Defences may be fully stated, your Lordships will be pleased to know, that a Statute of Bankruptcy having been taken out against him, while he was residing at *London*, he did surrender himself to

the Commissioners named by the Lord Chancellor, and made a full Disclosure and Discovery of his Estate and Effects; and having complied in every Thing with the Directions of the Statute, he did, with the Consent of four Fifths of his Creditors, obtain his Certificate from the Commissioners, which was confirmed by the Lord Keeper, upon the 27th of March 1759. And in Virtue of this Certificate, he is discharged of all Debts that were owing by him, at the Time he became Bankrupt, as he had fairly given up the whole Effects and Funds by which he could be enabled to pay the same. The Effect of such Certificates has been fully debated before your Lordships in other Cases, and particularly in one which is still depending; and therefore the Petitioner shall avoid giving your Lordships farther Trouble upon that Head, as he is persuaded the same Judgment will be given in his Case, that shall appear to your Lordships just to be given in other Cases of the like Nature.

May it therefore please your Lordships, to alter the said Interlocutors, and to find, 1mo, That the Indorsations of the Bills to the Charger, are not sufficient to prove, that Value was delivered by her to her Brother, without further Evidence, and as no Evidence is brought of the Onerosity, that the same are presumed to be gratuitous, and consequently, that it is relevant for the Petitioner to prove, by Thomas Douglas's Oath, that the Bills were given up and retired by him to the Petitioner, in Manner above set forth. 2do, That if the Indorsations of the Bills could be supposed to have been granted for Value; yet as the Bills had lyen over for near five Years, before any Action brought upon them, the Charger is not entitled to the Privilege of an Indorsee, but must be liable to the same Objections as any other Assignee; and therefore to sustain the Petitioner's Defence of Compensation and Retention

tion, upon the Grounds before-mentioned; or if any Difficulty occurs, to grant Diligence for recovering the Company-books, and the Bond above-mentioned, by which the same may be fully instructed; and 3tio, To find, that in respect of the above Certificate, granted by the Commissioners under the Statute of Bankruptcy, and confirmed by the Lord-Keeper, the Petitioner is not now liable to any Action at the Charger's Instance, on Pretence of Debts prior to the Bankruptcy, upon which the Commission was issued; and upon all these Grounds to suspend the Letters simpliciter.

According to Justice, &c.

JA. FERGUSON jun.

COPY Certificate of Thomas Douglas's Balance to the Company.

We John Ritchie Merchants in Montrose, and William Bailie Writer there, having this Day gone to the Custom-house of Montrose, where the Books of Thomas Douglas and Company, Merchants there do ly, and revised and examined the said Thomas Douglas his Accompt proper with the said Company, which is contained in eight Folios of the said Company's Ledger Book, we find, that the said Thomas Douglas is due to the said Company the Sum of 491 l. 13 s. 4 $\frac{1}{4}$ d. Sterling. In Witness whereof we have subscribed these Presents at Montrose, the 31st Day of July 1760 Years.

(Signed)

JOHN RITCHIE.
WIL. BAILLIE.

The above Examination was made in Presence of me James Scott of Logie, Esq; one of his Majesty's Justices of Peace for the County of Forfar. In Witness whereof I have subscribed these Presents, Place and Date above written.

(Signed) JAMES SCOTT, J. P.

tion, upon the Grounds before-mentioned; or if any Dis-
 crepancy occurs, to grant Diligence for recovering the Com-
 pany's books, and the Bank's accounts, by which the
 same may be fully ascertained; and also, To find, that
 in respect of the above Certificate, granted by the Com-
 missioners under the Statute of Bankruptcy, and conform-
 ably to the Lord-Keeper, the Petitioner is not more liable to
 any action at the Court's Instance, on Petition of Debt
 prior to the Bankruptcy, upon which the Commission was
 issued; and upon all other Grounds to support the Petition
 in this behalf.

According to Justice, &c.

J. A. KIRKTON Jnr.



COPY Certificate of Thomas Douglas's Balance to the Company.

We John Ritchie Merchants in Montreal, and William Bailie
 Witness there, having this Day gone to the Custom-house of
 Montreal, where the Books of Thomas Douglas and Company,
 Merchants there do lie, and revised and examined the said Tho-
 mas Douglas his Account proper with the said Company,
 which is contained in eight folios of the said Company's led-
 ger Book, we find, that the said Thomas Douglas is due to the
 said Company the sum of 491 £ 13 s 4 1/2 d Sterling. In
 Witness whereof we have subscribed these Presents at Montreal,
 the said Day of July 1760 Years.

JOHN RITCHIE
 WILL. BAILLIE

(Signed)

The above Examination was made in Presence of me James
 Scott of Logic, Esq; one of his Majesty's Justices of Peace for
 the County of Forth. In Witness whereof I have subscribed
 these Presents, Place and Date above written.

(Signed) JAMES SCOTT, J. P.